10-11-71

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	

APPLICANT'S ANSWER TO THE PETITION
TO INTERVENE OF THE STATE OF KANSAS

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The State of Kansas has filed a "Petition to Intervene, Or in the Alternative to Join Prior Interventions, or in the Alternative Notice of Participation Under 10 C.F.R. §2.715(c). Applicant Consumers Power Company hereby files its answer in opposition to that petition, pursuant to 10 CFR §2.714(b).*

The petition of the State of Kansas raises not only legitimate concerns about the health and safety of the people of Kansas but also very substantial questions of public policy. Applicant's position is not that these questions should be shunted aside or ignored but that this particular proceeding, both as a matter of law and of good judgment, is not the proper vehicle in which to explore them.

Applicant's position deserves particular weight because Congress has enacted legislation expressly providing that an Advisory Council should investigate the matter of particular

*The State of Kansas has agreed to extend our time to reply to October 11, 1971. (See our letter to the Board of Sept. 27, 1971).

concern to Kansas and its people, that the council report to Congress itself and that in no event shall action having a possibly adverse impact on Kansas be taken without Congress having an opportunity to legislate with respect to it.

The petition should also be denied insofar as it urges that the application by Consumers Power Company should not be granted "until such time as the AEC can demonstrate that the high level wastes will be disposed of in a manner assuring the complete protection of the health and safety of the public." Such a contention, which raises questions of national energy policy, should be considered in a general rulemaking or legislative-type proceeding of general applicability and not in a specific power reactor licensing case.

Accordingly any attempt by this Board to deal with the matter raised by Kansas would be wholly inappropriate. This Board cannot lay these problems of concern to Kansas to rest, and intervention by Kansas would only serve to further lengthen and complicate an already complex and protracted litigation. Applicant therefore asks that the petition be denied in all respects.

I. KANSAS SHOULD NOT BE PERMITTED TO INTERVENE BECAUSE THE ISSUES RAISED IN ITS PETITION ARE NOT PROPER ISSUES IN THIS CASE.

"[O]ne of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." Vinson v. Washington Gas Light Co., 321 U.S. 489, 498 (1944). Where the sole purpose of an intervention is to enlarge or alter the issues, it follows that the intervention would not be proper. "Thus, an undue broadening of the issues is a common ground for denying intervention." 1 DAVIS ADMINISTRATIVE LAW TREATISE §8.11 at 564 (1958).

Though 10 CFR §2.714(d) permits the Board to enlarge the issues in an order allowing intervention, it would appear that this was contemplated to be the exception and not the rule. Certainly there is no suggestion that issues not properly within the scope of the proceeding should be added.

Applicant will demonstrate that the proposed intervention of Kansas is designed solely to introduce into this proceeding issues which have not been raised before in this case and are not properly before the Board. Applicant submits that the petition should therefore be denied.

A. The Issue As To The Safety Of Depositing Wastes From The Midland Plant In Lyons, Kansas

The Kansas petition is wholly unrelated to any issue unique to the construction of the Midland plants involved in this proceeding. As appears from that petition, it has been filed only because the AEC is contemplating the use of a salt mine near Lyons, Kansas as a repository for solid radioactive wastes produced by nuclear electric power plants. The Kansas petition states (at p.3):

> "Because it is contemplated by the AEC that the Lyons, Kansas, facility will be the nuclear waste repository for the foreseeable future, wastes inevitably created by the operation of the Consumers Power Company Midland plants may be unavoidably committed to transportation and disposal in Kansas, involving a potential threat to the lives, health, and well being of Kansans."*

This primary concern of Kansas relates to the safety of the proposed Lyons repository. Thus, at p.2 of the petition, it is stated that the Governor of Kansas has expressed concern that the location of the repository in Kansas "without a complete environmental impact analysis as required by the National Environmental Protection [Sic] Act (NEPA) would be prejudicial to the interests of all Kansans." And the petition goes on to say that

*The petition, in the preceding sentence, made the following quotation from the AEC's NEPA statement on the project: "'...it is anticipated that this facility will ultimately be designated as the federal waste repository,....' (page 2)(emphasis supplied)" The entire sentence at p.2 of the Environmental Statement reads: "Although it is anticipated that this facility will ultimately be designated as the Federal Waste Repository, it will be initially operated as a demonstration facility."

"the Attorney General's intervention in the instant matter is appropriate for the protection of Kansas citizens from the potential dangers of the proposed waste repository project."

We earnestly submit that the issue of whether a radioactive waste repository in Lyons, Kansas would be safe or not, or whether its benefits would outweigh its dangers, is not a proper issue in this case, for two reasons.

The first is that Congress has created other, more appropriate forums and procedures for the resolution of that issue than a grab bag of reactor licensing cases in which it would be, at best, tangential.

Under §102(2)(C) of NEPA, the AEC is obligated to obtain the comments of other Federal, state and local agencies and to write a detailed statement on the environmental impact of such a repository. It has followed this procedure with respect to the Lyons repository. A final detailed statement was issued in June of this year and a supplement to it was issued in July of this year. As is evident from both the Appendix and the Supplement to the Detailed Statement, the officials and elected representatives of Kansas made their views and concerns known to the AEC.

Moreover, in response to the understandable fears expressed by Kansans and their representatives, Congress adopted a rider to the recent AEC Authorization Bill for Fiscal 1972 (Public Law 92-84) dealing specifically with this problem. See 1971 U.S. Code Cong. & Ad. News, Vol. 7 at pp. 1651-52. This rider stated:

"Project 72-3-b, national radioactive waste repository, Lyons, Kansas, $3,500,000: Provided that--

(A) Except as provided in subparagraph (E), no funds shall be obligated or expended (i) for the acquisition of a fee simple interest in land or for the acquisition of any other interest in land which exceeds three years from the date of enactment of this Act, or (ii) for or in connection with the burial of radioactive materials at the proposed site other than for experimental purposes, including demonstrations, and then only when and if such materials are fully retrievable throughout such three year period.

(B) The President of the United States shall appoint an advisory council which shall be composed of nine members at least three of whom shall be from Kansas. The advisory council may report to the Congress from time to time.

(C) The Atomic Energy Commission (acting directly or by contract) shall conduct laboratory and other tests and research (whether onsite or elsewhere) relating to the safety of the project, the protection of public health, and the preservation of the quality of the environment before any high level radioactive waste material is placed in salt mines at the proposed site except as provided in subparagraph (A).

(D) No high level radioactive materials shall be buried or used, other than as provided by clause (ii) of subparagraph (A), at the proposed site until the advisory council reports to the Congress that construction and operation of such project and the transportation of waste materials to the project can be carried out in a manner which assures the safety of the project, the protection of public health, and the preservation of the quality of the environment of the region.

(E) The limitations provided by subparagraph (A) shall not apply after the expiration of sixty calendar days of continuous session of the Congress after the date on which the advisory council submits its report under subparagraph (D). For purposes of the preceding sentence, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty day period."

Thus, Congress has created a special advisory council to decide on the safety, health and environmental consequences of the proposed Lyons repository. Moreover, paragraph E of the rider, as well as the fact that the advisory council must report to Congress, contemplate a final decision by Congress after the report of the advisory council comes in. Thus, it would be presumptuous for an Atomic Safety & Licensing Board to try to decide whether or not there shouldbe a repository at Lyons.

Moreover, even if Congress did not act and Kansas was not satisfied with a favorable report from the advisory council or the AEC proceeded with the project despite an adverse report from the advisory council, a Federal District Court would still have jurisdiction to review the adequacy of the AEC's attempted compliance with NEPA while entertaining an action by Kansas to enjoin the AEC from beginning work on the project. See Committee for Nuclear Responsibility v. Seaborg, unpublished, No. 71-1732 (D.C. Cir. Oct. 5, 1971) (Held: District Court should have granted full hearing on action to enjoin AEC from conducting an underground nuclear test in Alaska for failure to adequately comply with NEPA)*; temporary injunction against further construction of the Tennessee-Tombigbee Waterway in Mississippi reported in the Washington Post, September 22, 1971, p.1 col. 3 (D.D.C.); EDF v. Hardin, 1 ELR 20207, 20209 (D.D.C. April 14, 1971) (held: court had jurisdiction to review decision by Secretary of Agriculture to proceed with a program involving aerial spraying of the pesticide Mirex);

*A copy of this opinion is enclosed.

Sierra Club v. Hardin, 1 ELR 20161, 20166 (D. Alaska March 25, 1971)(held: Court had jurisdiction to review sale of timber and land and grant of a pulp mill - sawmill construction permit in a national forest for compliance with NEPA although injunction was refused, partly due to failure to exhaust administrative remedies); EDF v. Corps of Engineers, 2 ERC 1260 (E.D. Ark. Feb. 19, 1971)(held: jurisdiction exists to enjoin construction of a dam and reservoir pending compliance with NEPA); Sierra Club v. Laird, 1 ELR 20085 (D. Aug. 1970)(Corps of Engineers enjoined from doing channel clearing work on Gila River because NEPA hadn't been complied with); Wilderness Society v. Hickel, 1 ELR 20042, 20043 (D.D.C. 1970)(Secretary of Interior enjoined from issuing permit for construction of Trans-Alaska Pipe Line for failure to comply with NEPA); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 245-46 (M.D. Pa. 1970) (held: there is jurisdiction to review compliance with NEPA in action to enjoin a road building project). And a court action of that type would focus exclusively on the Lyons repository and its environmental implications, unclouded by all of the peculiarly local and unrelated factors which enter into a licensing decision for a particular nuclear power plant.

In sum, Congress has created other forums, both ample and more suitable, for the resolution of the issues with respect

to the Lyons repository than this case.* Indeed, one would have to conclude from all of the foregoing that it was Congress' intent that the matter should be resolved elsewhere, perhaps ultimately by Congress itself.

The second reason why the health risks, safety and environmental impact of the Lyons repository are not proper issues in this case is that it is too uncertain that radioactive wastes from the Midland plant will ever be deposited in Lyons or that tests will not have demonstrated the safety of the project to Kansas' satisfaction prior to the time that the repository becomes operational. The impact on Kansas of a nuclear plant in Midland is both contingent and remote.

For one thing, the AEC itself has not made a decision to use the Lyons site as a radwaste repository. Thus, in a letter to Governor Docking of Kansas dated June 4, 1971 from John A. Erlewine, Assistant General Manager for Operations of the AEC, on the first page of the Appendix to the Environmental Statement on Lyons, Mr. Erlewine stated:

> "We share your concern that the future of Kansas be protected and we assure you that the necessary studies and investigations will be conducted and a final determination of the site suitability made prior to the permanent emplacement of any wastes in the Lyons facility."

*Committee for Nuclear Responsibility v. Seaborg, supra, held that a Congressional appropriation for an atomic test did not constitute, by implication, a pro tanto repeal of NEPA. Our position here is not that the 1972 AEC authorization bill made NEPA inapplicable to the Lyons repository project but that it also provided procedures supplementary to NEPA for resolving the issues with respect to that project. As we have said, we think compliance with NEPA on Lyons is still necessary and subject to judicial review.

Moreover, the Commission last month decided, because of the identification of certain potential problems with respect to the Lyons site, to hold in abeyance the leasing of land and plugging of holes at Lyons and to conduct a "literature study" on possible alternative sites. See letter of Sept. 30, 1971 from John A. Erlewine to Edward J. Bauser, Executive Director of the Joint Committee on Atomic Energy, Atomic Energy Clearing House, Oct. 4, 1971 at pp. 3-4. (The full excerpt from the letter reprinted there is annexed hereto as Appendix A). Although the study is designed to find alternative sites in Kansas, the fact that even the AEC sees possibly insuperables problems connected with the Lyons repository shows how uncertain it is that the project or one similar to it in Kansas will ever by carried out.

If there were any doubt about the AEC's intentions, however, there can be no doubt about those of Congress. The rider to the Authorization Bill makes it clear that Congress is still a long way from deciding whether the Lyons project should be carried to completion and suggests that Congress may well want to make the ultimate determination itself. In the recent debate on the Public Works and AEC Appropriations bill, Congressman Rhodes of Arizona, a member of the conference committee, stated, in response to questioning from Congressman Skubitz of Kansas (117 CONG. REC. H8634 (Sept. 22, 1971)):

> "I certainly am sure that the rest of the committee will agree with me when I say that it was our intent for the Atomic Energy Commission to spend only so much money as is necessary to acquire rights to the surface and rights to drill under the surface to determine

> what the underpinnings of the earth are in that particular point, so that facts can be found which would either indicate safety or lack of safety. We do not intend for the Atomic Energy Commission to take any steps whatsoever which are not necessary for this particular purpose.
>
> * * *
>
> The gentleman from Kansas, I hope, understands that the subcommittee, and the full Committee on Appropriations share the desire expressed by the gentleman and by other responsible officials in the State of Kansas to make absolutely certain that the project is completely safe before there is any thought of proceeding with it."

And the Joint Committee on Atomic Energy, in a report recommending an authorization for the project without the restrictive rider subsequently attached, stated, "that if the research and demonstration program at the salt mine in Kansas does not meet reasonable standards before commercial operations begin, the project will be cancelled and appropriate steps will be taken to safely terminate any activities undertaken prior to that decision." S. REP. NO. 29-249, 92d Cong., 1st sess. 62 (July 8, 1971).

Of course, even if the site is approved by the AEC, the advisory council and Congress, and the disapproval of any one of them would probably be fatal to the project, a reviewing court may still decide that NEPA has not been properly complied with. See authorities cited at p. 6-7, supra.

Even the first unit of the Midland plant will probably not be in operation before 1977. There will not be any spent fuel sent from it to a reprocessing plant until a year and a half after operations start and the separation of high level radioactive waste from that fuel will probably take an additional half year.

Paragraph 2 of Appendix F to 10 CFR Part 50 provides that solid high level radioactive wastes may be stored at the reprocessing plant for up to ten years. Thus, it will be over eighteen years before any high level radioactive waste from the Midland plant will have to be buried at a repository. By that time, either all doubts about the safety of the Lyons repository will have been removed by research and testing or some alternative repository will have been established.

It can be seen then, that any injury to Kansas from radioactive wastes produced by the Midland plant is highly conjectural. The law on standing to sue in the Federal courts, although not strictly applicable to standing to litigate before Federal administrative agencies, has become so liberal in recent years that it should provide some guidance to rules of standing before such agencies. One of the two requirements for standing to sue in a Federal court is an allegation by the plaintiff "that the challenged action has caused him injury in fact, economic or otherwise". Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152 (1970). Kansas cannot now claim, with any degree of assurance, that construction of the Midland plant will cause it any sort of injury in the future.

B. The Issue As To Whether Any Construction Permit May Be Granted For A Nuclear Power Plant Until A Definite National Plan For the Disposal Of High Level Radioactive Wastes Produced By Nuclear Reactors Has Been Worked Out And All Doubts About It Have Been Resolved.

The Kansas petition states (p.4): "The Attorney General contends that no operating license may lawfully be granted to the Consumers plant until such time as the AEC can demonstrate that the high level wastes will be disposed of in a manner assuring the complete protection of the public health and safety." This proceeding involves an application for a construction permit, not an operating license. We will assume, therefore, that the issue Kansas intended to pose was whether a construction permit should be granted before a definite plan for disposing of the high level wastes from the plant can be demonstrated to be completely adequate.

This issue is no different for the Midland plant than for any other plant. It really is a question of whether the entire power plant licensing program should come to a complete halt until such time as all questions relating to the problem of disposal of high level wastes are definitively resolved. This is a national policy question of the first order.

The Commission has heretofore chosen to deal with the general policy questions involved in disposal of high level radioactive wastes by rulemaking rather than by adjudication. See Appendix F to 10 CFR Part 50 and the Statement of Considerations accompanying its issuance - Siting of Fuel Reprocessing Plants and Related

Waste Management Facilities, 35 Fed. Reg. 17530 (1970), a copy of which are annexed hereto as Appendix B. It has long been held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." (SEC v. Chenery Corp., 332 U.S. 194, 203 (1946); accord Alabama-Tennessee Natural Gas Co. v. FPC, 359 F.2d 318, 343 (5th Cir.), cert. denied, 385 U.S. 847 (1966); Regular Common Carrier Conference v. United States, 307 F. Supp. 941, 943 (D.D.C. 1969)(three-judge court); see American Airlines v. CAB, 123 App. D.C. 310, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843 (1966). Thus, even a court would have to respect the Commission's decision to treat the high level radioactive waste disposal problem by rulemaking rather than adjudication. Certainly, this Board, which is clearly subject to the Commission's rulemaking power, should do so.

Moreover, there are good reasons supporting the Commission's decision to treat a problem such as this by rulemaking rather than adjudication. As Judge Friendly stated in WBEN, Inc. v. United States; 396 F.2d 601, 618 (2d Cir.), cert. denied, 393 U.S. 914 (1968).

> "Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them."

Indeed, in the Alabama-Tennessee case, supra, at 341, the Court of Appeals characterized the action of the Federal Power Commission deciding an important, industry-wide issue relating to the use of liberalized depreciation by natural gas companies in the context of a specific rate increase proceeding as "singulary eccentric". Despite this reservation, the Court felt compelled by the Chenery rule to respect the agency's choice of procedures. However, unlike the instant case, Alabama-Tennessee did not involve a situation in which Congress had created a special body to deal with an important aspect of the general problem of high level radioactive waste. Thus, there is even more reason here for the Board to permit this quasi-legislative problem to be handled either by Commission rulemaking or by Congressional enactment or by a combination of both.

Two recent decisions of the U.S. Court of Appeals for the D.C. Circuit are directly in point.

In Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970), the appellants had protested renewal of a radio station license in Salt Lake City, alleging, inter alia, that the station was owned by a subsidiary of the Mormon Church which also is the ultimate owner of other TV and radio stations, a university and two daily newspapers in the Salt Lake City area. The appellants alleged that "it is unwise for newspapers to be under common ownership with radio and television interests, and for both to be part of a broader business combine." The FCC denied the

requests for a hearing on the ground that there were no substantial questions of fact and granted the renewal. The Court of Appeals affirmed. In dealing with the question of concentration of ownership of the mass media which had been raised by appellants, it stated (id. at 560):

> "Appellants essentially argue that the fact of the concentration, without further showing, is enough to require a hearing to determine whether the license renewal would serve the public interest. This is in reality a challenge to the wisdom of the Commission's existing multiple ownership rules, which have allowed the granting of licenses to conglomerate structures of the kind involved here. Thus it is that, in the context of this particular renewal proceeding, appellants seek a hearing to effectuate an overhaul of the Commission's general policy that multiple ownership and resulting concentration are not per se against the public interest. The Commission has, however, embarked upon rulemaking in this very area of multiple ownership of AM, FM, and TV operations, 33 Fed. Reg. 5315; and it has initiated investigations into conglomerate ownership. Dismissing informal renewal protests very similar to those made by appellants, the Commission had this to say:
>
> We believe that, in view of this showing, there is no basis for ad hoc action against the licensee on grounds of undue concentration of control of media of mass communications. Rather, any actions in this area as to a licensee such as this would be appropriate only in the context of overall rule-making proceedings. In this connection we point out the outstanding inquiry on conglomerate ownership and the specific rule-making proceeding, FCC Docket No. 18110.
>
> There is a rational foundation for the Commission's position that a basic change in policy such as appellants here seek is better and more fairly examined and considered in rule-making proceedings, where the inquiry can be thorough and where all interested parties can participate. Appellants' protests seem tc us to assert that undue concentration of communications media has a tendency towards

> adverse impact on the public interest which warrants a policy of flat prohibition without reference to whether there are incidental injuries in fact. But this is the very question which the Commission is presently pursuing in actual rule-making and in investigations looking toward rule-making. That pursuit may be more effectively and properly carried on there than by setting this renewal application down for hearing with a view to a change in policy with respect to this particular applicant." (Footnote omitted).

In Martin-Trigona v. FPC, 432 F.2d 682 (D.C. Cir. 1970), the petitioner had asked the FCC to revoke the licenses of three television stations in New York City, raising questions about the wisdom of the ownership of broadcast licenses by the networks. He argued that networks are conglomerates and therefore have conflicts of interest, that the network structure lends itself to conflict with antitrust policies and creates undesirable concentrations of power. Although not specifically challenging the program content of the stations in question he asserted that the networks are guilty of excess commercialism and undue sensitivity to the interests of advertisers and that network programs are therefore cautious and dull. The FCC dismissed the petitions on the ground that the allegations failed to show the kind of interest which would give plaintiff standing to oppose the renewal. The Court of Appeals affirmed, stating (id. at 683):

> "Much is made by petitioner here of our decision in Office of Communications of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966). We, however, see little or no relationship between him and

> the complainants in that case, who were objecting on specific grounds to the license renewal of the key station in their viewing area. Petitioner, in contrast, raises broad policy questions, and doubtless important ones, about the broadcasting structure as a whole. Those questions are in important respects identical with the issues which we recently said are more appropriate for exploration and resolution in rule making than in adjudication. Hale v. FCC, 138 U.S. App. D.C. 125, 425, F.2d 556 (1970). As we said there, the 'policy questions [raised] are applicable to the communications industry as a whole, and are not peculiar to one unit of it.'
>
> The network intervenors have suggested that, while petitioner may well be regarded as having standing to petition the Commission to initiate rule making and, in appropriate circumstances, to secure judicial review of the denial of such a petition, he is without standing to complain of these license renewals. Whether the matter is best approached analytically in traditional standing terms seems to us questionable. In any event, the particular verbal formulation is not of critical significance in this instance to our decision to leave the Commission's disposition undisturbed. The issues which petitioner sought to raise do not have such relevance to the individual station license renewals as would necessitate their pursuit by the Commission in the renewal proceedings." (Footnote omitted).

The same sort of broad policy issues are raised in the petition at issue here. Kansas' position, if adopted, would stop the entire nuclear power plant licensing program. Thus far, it has chosen to seek intervention in the Vermont Yankee case and in this one.* It could seek to intervene in any

*It has been permitted to participate in Vermont Yankee under 10 CFR §2.715(c), although the scope of its participation has not yet been determined. See tr. of August 10, 1971 at pp. 395-425.

other pending case on the same theory and with the same sort of interest. "Flexibility in agency proceedings is imperative so that an agency may carry out its policies in the most intelligent, expeditious and efficient manner possible, consistent with the requirements of due process." Regular Common Carrier Conference v. United States, 307 F. Supp. 941, 944 (D.D.C. 1969). Obviously it is neither efficient nor expedient to have this issue determined by different Atomic Safety & Licensing Boards in particular power plant licensing cases. It is a matter for the entire Commission to decide in a rule-making proceeding in which any interested party or member of the public can participate. Besides, the question of whether to put a moratorium on the issuance of nuclear power plant licenses until the waste disposal issue is completely resolved is not a question of fact but a policy question which goes far beyond the interests of Kansas and of the parties to this case; it is therefore not well suited for resolution by a trial type of hearing in this proceeding. See K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.02 at 413-14 (1958). For these reasons, we submit that Kansas' only proper remedy on this broad question is to petition the Commission under 5 U.S.C. §553(e) to modify or repeal its Appendix F to Part 50 and the statement of considerations with it (Appendix B hereto) or to substitute a rule stopping all reactor licensing until final resolution of the high level waste disposal problem.

Dealing with the issue by rulemaking does not mean that NEPA could or would be ignored. But there is nothing in NEPA which requires an agency to deal with a broad issue of policy in separate adjudicatory proceedings (involving the safety of different facilities) rather than in rulemaking. Moreover, Mr. Roisman's argument in Vermont Yankee (August 10, 1971 tr. at 402) that the part of the D.C. Circuit's Calvert Cliffs decision dealing with water quality requires that Kansas be allowed to intervene in any reactor licensing case is not well taken. In the old Appendix D to 10 CFR Part 50 invalidated in Calvert Cliffs, the AEC tried to rule out any NEPA evaluation of water pollution to be caused by a given plant where a water quality certificate had been obtained under the Water Quality Improvement Act. Our position here is not that there should be no NEPA review at all of the broad issue raised by Kansas but that it should be done in one rulemaking proceeding rather than in multiple, adjudicatory, reactor-licensing proceedings.*

Finally, it should be remembered that Congress, in considering the AEC authorization and appropriations bills for fiscal 1972, gave extensive consideration to the problems posed by the Lyons repository. See Hearings on AEC Authorizing Legislation for 1972 Before the Joint Committee on Atomic Energy,

*As we have pointed out, there has already been a NEPA review of the Lyons project itself.

92nd Cong., 1st Sess., Part 3, pp. 1307-1586 and related Appendices 1908-2235 and Part 4, 2473-2478 (1971); 117 CONG. REC. H1049 (Mar. 1, 1971); H1678 (March 17, 1971); S3416 (Mar. 19, 1971); H1797 (Mar. 22, 1971); E2420 (Mar. 29, 1971); H3244 (Apr. 29, 1971); H6321 (May 6, 1971); H3937 (May 13, 1971); H4733 (Jun. 4, 1971); H5043 (Jun. 10, 1971); H5157 (Jun. 14, 1971); H5722 (Jun. 22, 1971); H5845 (Jun. 23, 1971); S9852 (Jun. 24, 1971); H5901 (Jun. 24, 1971); S10,639 (July 8, 1971); H6738 (July 14, 1971); H6760 (July 15, 1971); H6762-6801 (July 15, 1971); E7716 (July 15, 1971); S11,502-11,565 (July 20, 1971); H6921 (July 20, 1971); H7046 (July 21, 1971); H7131 (July 26, 1971); H7189 (July 27, 1971); E8456 (July 28, 1971); S12,695 (July 31, 1971); H7826 (Aug. 3, 1971); H8131 (Aug. 5, 1971); H8634 (Sept. 22, 1971); (All daily ed.). Significantly, it was never suggested by anyone, in the course of the hearings or debates, that the entire power plant licensing program be held up until all doubts could be resolved about the safety of the Lyons repository or some other type of waste repository. The fact that Congress handled the problem by setting up an advisory council to report on the Lyons project and by narrowly restricting what can be done at Lyons pending submission of the council's report is an indication that it did not favor the kind of drastic approach suggested by Kansas here.

C. The Other Issues Raised in the Petition

Kansas raises other issues (petition, pp. 3-5) which it says are already in the case. As to these, Kansas obviously either has no interest in them (compliance with the Clean Air Amendments, for example) or its only interest stems from its interest in the Lyons repository which, as we have shown, is not cognizable here. They therefore do not constitute a proper basis for permitting intervention.

II. KANSAS SHOULD NOT BE PERMITTED TO JOIN IN THE INTERVENTION OF OTHERS.

Kansas asks that, if its motion to intervene is denied, it be permitted to join in the intervention of the Saginaw intervenors. The Staff seems willing to go along with this, with certain reservations and conditions, despite the fact that it does "not concede that Kansas is entitled to participate in this proceeding in its own right." (Staff's answer p.2). We strongly object to it.

We frankly do not understand how Kansas can be allowed to "join" in the intervention of others if it is not entitled to participate in the proceeding in its own right. 10 CFR §2.714 only speaks of one kind of intervention. We fail to see what could be meant by "joining" in the Saginaw intervention or how joining in the intervention of others is significantly different from intervening independently. It would mean that Kansas, as a party intervenor, could assert the issues raised in its petition not only before this Board but before the Appeal Board and the Courts. If we are right in our argument

that it has no business as a party in this case, then it should not be permitted to intervene in any way, shape or form.

The Staff (Answer, p.2) further states that it does not "concede that all of the issues as to which Kansas has indicated concern are within the scope of this proceeding" and mentions certain issues, among them "ultimate disposal of high-level wastes resulting from reprocessing", which it contends "are outside the scope of this proceeding."

The Staff has, moreover, made it perfectly clear that the only issues of real concern to Kansas are, in its view, beyond the scope of this proceeding. In a letter to the members of this Board dated October 8, 1971, counsel for the AEC Regulatory Staff has stated:

> "...we note our disagreement with the intervenors' apparent view that the environmental evaluations to be performed in this proceeding must cover the entire nuclear fuel cycle.
>
> * * *
>
> "...We will not consider, will not require the applicant to address himself to, and oppose evidentiary consideration in the public hearing of, the effects of mining, milling, feed material preparation, fuel enrichment, fuel fabrication, fuel reprocessing or the subsequent interim storage, solidification, transportation, and ultimate disposal (long term storage) of high level wastes which result from reprocessing. We do not believe that consideration of these matters at this time and in this proceeding is required by the National Environmental Policy Act, the Calvert Cliffs' decision, or the Commission's rules and regulations, including 10 CFR Part 50, Appendix D."

In these circumstances it makes no sense to allow Kansas in at all, for, as we stated in Part IC, supra, the other issues raised by Kansas are ones in which they have no real interest which would constitute a proper basis for permitting their intervention.

III. KANSAS SHOULD NOT BE ALLOWED TO PARTICIPATE UNDER §2.715(c).

The Kansas petition (Point V at p.6) states:

> "Should the petition to intervene or request to join in pending intervention be declined, the Attorney General hereby serves notice of his intention to participate through his representative in any and all proceedings on the matter under 10 C.F.R. §2.715(c)."

Ordinarily, we would not deem it necessary to reply to such an expression of intention but would reserve our objections until such time as Kansas actually attempted to participate in this proceeding. However, as Kansas seems to treat its proposed §2.715(c) participation as an alternative way of doing what it would like to do by an intervention and as the Vermont Yankee Board ruled on Kansas' rights under §2.715(c) in the context of deciding whether it should be allowed to intervene, we deem it advisable to make our objection to such participation now.

§2.715(c) provides:

> "The presiding officer will afford a representative of an interested State which is not a party a reasonable opportunity to participate and to introduce evidence, interrogate witnesses,

> and advise the Commission without requiring the representative to take a position with respect to the issues." (emphasis added).

This regulation is designed to implement the second part of §274(l) of the Atomic Energy Act. Section 274(l) provides:

> "With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection c., the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application."

As §274(l) deals with the rights of "States in which the activity will be conducted", §2.715(c) must also be dealing with the rights of such states. As Kansas is not a state in which the activity authorized by the construction permit applied for here will be conducted, it has no rights under §2.715(c).

Moreover, §2.715(c) only affords rights to "an interested State". For the reasons stated in parts IA and B of this Answer, Kansas has no cognizable interest in this proceeding.

CONCLUSION

For all the foregoing reasons, the petition of the State of Kansas should be denied. However, it should be made clear that this is without prejudice to the right of Kansas to challenge the selection of Lyons as a waste repository in any other forum in which that issue is an appropriate one and without prejudice

to the right of Kansas to petition the Commission for rulemaking with the object of putting a moratorium on nuclear power plant licensing until a definitive satisfactory plan has been adopted for the ultimate disposal of high level radioactive wastes.

As we have argued, it makes no sense to let Kansas into this case if the issues discusssed in Parts IA and IB of this Answer are not properly within the scope of this proceeding. However, if the Board should nevertheless permit Kansas to participate on other issues, it should clearly rule out the raising of the issues discussed in Part IA and IB of this Answer.

Dated: October 11, 1971

Respectfully submitted,

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UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to the Petition To Intervene Of the State Of Kansas", dated October 11, 1971, in the above-captioned matter has been served on the following in person or by deposit in the United States mail, first class or airmail, this 11th day of October, 1971.

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APPENDIX A

"This letter is to confirm discussions held on September 24, 1971, with you and Mr. Shwiller by Dr. Pittman and Mr. Donoghue of the Atomic Energy Commission's Division of Waste Management and Transportation regarding a literature study which we plan to make on possible alternative sites in Kansas for the National Radioactive Waste Repository.

"The Commission decision to make this study arose as a result of certain additional information, given in more detail in the enclosure hereto, which has recently come to light concerning: (1) operations of the American Salt Company mine near the Lyons site; and (2) problems of plugging of the numerous deep oil and gas wells located on or immediately adjacent to the Lyons site.

"In each instance, the new information raises questions concerning our ability to assure that water will not be introduced into the bedded salt formation at the repository site. Since absence of water is a key factor in the long range safety of the use of the bedded salt as a storage repository for radioactive waste, the Commission feels that its only prudent course of action, pending a more detailed and extensive evaluation of the new information is to make a literature search to identify other potential repository sites in the Kansas salt bed formation. We would stress that the Commission has not made a finding that the Lyons site is unacceptable or that any other more acceptable site can be found. Our objective is to assure that, should our future evaluation indicate that Lyons is not safe and acceptable by reason of unresolvable problems raised by American Salt Company operation or by the existence of oil and gas well penetrations which cannot be satisfactorily sealed, continuity of this very important effort will not be compromised.

"We have, therefore, instructed the Oak Ridge National Laboratory to enter into a contract with the Kansas Geological Survey, as the group having the most knowledge and greatest degree of expertise on the situation in the State of Kansas, in cooperation with Dr. Robert Walters, an ORNL consultant from the Kansas area, to undertake a literature survey of various potential locations in Kansas where salt bed thickness and depth, the overlying and underlying formations, and other geologic and hydrologic factors are similar to those at Lyons. As a part of this overall study, the KGS will work with the AEC and ORNL in the development of detailed criteria which could be used for specific site selection should this be necessary. The study will be complete by November 1, 1971, and the final report will be available by December 1, 1971.

"Pending further evaluation of the 'hole plugging' problem and further discussions with the American Salt Company management to lead to a better understanding and evaluation of potential problems raised by their activities, and awaiting the results of the KGS study, we are holding in abeyance any further site oriented work at Lyons, including leasing of land and plugging of holes.

"During the course of the meeting on September 24, 1971, you raised questions concerning the Advisory Council called for by the FY 1972 Authorization Act. We have no information on the status of appointment or potential membership of the Council, nor are we informed on how the administrative aspect of the Council's operation will be handled.

"We hope that this letter and its enclosures furnish you the information you need, however, should you require additional information, please let us know. . . .

APPENDIX B

PART 50 - LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

35 FR 17530
Published 11/14/70
Effective 2/12/71

Siting of Fuel Reprocessing Plants and Related Waste Management Facilities

On June 3, 1969, the Atomic Energy Commission published in the FEDERAL REGISTER (34 F.R. 8712), and invited public comment on, a proposed statement of policy, in the form of an appendix to 10 CFR Part 50, concerning the siting of fuel reprocessing plants and related waste management facilities. The function of reprocessing plants is to recover valuable unused nuclear fuel from fuel elements removed from reactors when the elements have reached the end of their useful lives. In addition to the unused fuel, the elements contain radioactive fission products generated during reactor operation. They emerge from the chemical reprocessing as liquid or solid wastes which must be safely disposed of.

The proposed statement of policy dealt principally with (1) the question as to whether the safety problems and characteristics associated with operation or with the decommissioned status of a licensed fuel reprocessing plant require, from the standpoint of the public health and safety, that these plants be located on land owned and controlled by the Federal Government; and (2) the question of ultimate disposal of high-level radioactive fission product wastes generated at these plants. The Commission has concluded that public health and safety considerations relating to fuel reprocessing plants do not require that such facilities be located on land owned and controlled by the Federal Government. Such plants, including the facilities for the temporary storage of high-level radioactive wastes, may be located on privately owned property. This conclusion was based on (1) the availability of technology for solidifying the high-level waste in forms suitable for safe transport to and disposal at a Federal repository specially selected and designed for permanent removal of such radioactive wastes from the biosphere, and

(2) a recognition that fuel reprocessing plants can be so designed that radiologically significant contaminants may be removed or otherwise satisfactorily disposed of when the plant is retired from operational service.

The proposed appendix to 10 CFR Part 50 would state, among other things, that the high-activity liquid wastes generated in a fuel reprocessing plant must be converted to an AEC-approved solid form and transferred to a Federal waste repository. The liquid waste could be stored at the fuel reprocessing plant as long as 5 years before conversion to solid form. Shipment to a Federal repository would not be required until 10 years after generation of the liquid waste. The proposed appendix would also provide that reprocessing plants must be designed to facilitate decontamination and removal of all significant radioactive wastes in the event a plant is retired from operational status. License applicants would be required to furnish information on financial qualifications to provide for the removal and disposal of radioactive wastes in accordance with the Commission's existing regulations.

Interested persons were invited to submit comments and suggestions for consideration in connection with the proposed statement of policy within 60 days after publication in the FEDERAL REGISTER. The comment period was later extended to September 15, 1969.

Upon consideration of the comments received and other factors involved, the Commission has adopted the statement of policy which follows. The statement is the same as that published for comment on June 3, 1969, except as noted below.

Of primary concern in developing a policy for the siting of fuel reprocessing plants is the need to restrict, in the interest of public health and safety, the quantities and mobility of the high-level radioactive wastes stored onsite at fuel reprocessing plants. During the past 15 years the Commission has been carrying out research and development programs aimed at developing a method for effectively and permanently removing these wastes from man's biological environment. These programs have also been designed to reduce the possibility of the inadvertent release of such wastes to the environment.

The major emphasis in these programs has been directed toward the conversion of liquid wastes into solid forms suitable for interim onsite storage, safe transport and disposal in selected deep geologic formations. These general concepts were initially suggested in 1955 by the Committee on Radioactive Waste Disposal of the National Academy of Science-National Research Council. The concepts have been supported by successor committees of the Academy. In the interim the technical feasibility of both waste solidification and solid waste disposal in deep geologic formations has been demonstrated. On June 17, 1970, the Commission announced the tentative selection of a site near Lyons, Kans., for the location of a demonstration repository. Authorization and appropriations for construction of the repository will be sought in the fiscal year 1972 budget. It is anticipated that this storage facility—constructed in a deep, bedded-salt formation—will be designated as the initial Federal repository for solid radioactive wastes.

As stated in the Commission's June 17th announcement, bedded salt for long-term storage of radioactive wastes is particularly attractive. It is widespread and abundant; it has good structural properties; it is relatively inexpensive to mine; its thermal properties are better than those of most other rock types; and it occurs generally in areas of low seismicity. Most importantly, salt deposits are free of circulating ground waters and completely isolated from underground aquifers by essentially impermeable rock formations. Furthermore, this situation tends to be preserved because any fractures which might develop are readily healed by plastic deformation of the salt.

There is no indication that alternative technologies, suitable for power reactor fuels, will be available in the foreseeable future. However, should alternate technology become available, and should it appear to be equivalent to or an improvement over that specified in the policy adopted by the Commission, it will be evaluated and given appropriate consideration.

The Commission is continuing to evaluate the feasibility of storage of high-level liquid radioactive wastes from its production facilities at Savannah River, S.C., and Hanford, Wash., in underground caverns beneath these sites. The over 80 million gallons of high-level wastes now stored in tanks at these installations constitute over 95 percent by volume of all high-level wastes in this country. However, such wastes differ materially in radioactivity level, heat output and chemical composition from wastes produced by licensed fuel reprocessing plants planned or under construction. For example, the Savannah River and Hanford wastes have been chemically neutralized, contain large volumes of nonfission product materials, and have heat and radioactivity outputs many times lower than the licensed plant wastes. Most of the Savannah River and Hanford wastes were generated as the result of operations to meet defense needs.

There are a number of unique considerations and incentives for the Commission's decision to support research and development on long-term storage in underground caverns beneath these Savannah River and Hanford sites. These include: The large volume of the Savannah River and Hanford wastes; the relatively low heat output of these wastes as compared with those from licensed reprocessing plants; and the tremendous estimated cost and related problems of solidifying and shipping these wastes offsite. This research and development program is being performed in phases. In the interim both Savannah River and Hanford are immobilizing their tank-stored liquid wastes by evaporating them to salt cakes in the existing tanks. Before any decision is made to store wastes in underground caverns a substantial amount of exploration work will be necessary to assure that the wastes will be isolated from the biosphere for centuries. The research and development program at Savannah River to date, and further exploratory drilling and mining to determine the suitability of the bedrock under the site, are expected to cost about $14 million. Such a research and development program is a necessary prerequisite to a decision to construct a facility solely for Savannah River wastes. Nevertheless, because of the large volume of wastes already in existence at that site, long-term storage of the waste in caverns mined in the bedrock offers the potential of significant cost savings as compared to the alternative of solidification and storage offsite. However, it is doubtful that bedrock storage of liquid wastes would be attractive for licensed reprocessing plants. Specifically, the high cost of the research and development program that would be required to prove out the bedrock at each location, the uncertainty and associated delay until the site is accepted, and the high estimated costs of constructing each such disposal facility, support this conclusion.

At this time there is only one licensed fuel reprocessing plant in operation; consequently the industry does not have a significant volume of existing stored liquid wastes. Planners of new reprocessing plants have available to them proven AEC-developed processes designed to generate relatively small volumes of acid wastes and to reduce these wastes to acceptable solid forms. Recent AEC studies (e.g., ORNL-4451, "Siting of Fuel Reprocessing Plants and Waste Management Facilities") indicate the estimated cost of solidification and shipment of wastes from licensed reprocessing plants to Federal repositories for storage will not have a significant impact on the nuclear power industry.

The Commission does not now regard storage of liquid high-level wastes in tanks as constituting an acceptable method of long-term storage. Commission experience with its tank storage of liquid high-level wastes is extensive and while tank design, construction and maintenance have improved, the fact remains that tanks can deteriorate and leak and that wastes in liquid form offer a much more serious potential for dispersal in the environment in the event of an accident no matter how unlikely such an accident may be, and present far more difficulty for recovery and decontamination than solidified wastes. Tank storage requires extensive surveillance, and often requires mechanical cooling apparatus to be functioning continuously. Over periods of centuries one cannot assure the continuity of surveillance and care which tank storage requires.

Some period of in-tank storage of liquid wastes at the reprocessing plant-site may be required for cooling purposes depending upon the solidification process to be used. However, the requirement to solidify such wastes, within 5 years of their generation, into a form suitable for off-site shipment and long-term storage will assure that liquid wastes do not accumulate on-site in large quantities.

November 28, 1970

The Commission has given careful consideration to the safety considerations associated with the transport of solid radioactive wastes to a Federal repository. The technology and experience resulting from the transportation of irradiated fuel elements over the last 20 years provide a firm basis for developing safe, reliable systems for shipping solidified high-level radioactive wastes. Shipments of solidified radioactive wastes carried out in accordance with regulations of the AEC and the Department of Transportation should not endanger the health and safety of the public.

As noted, the policy includes a 5-year limit on interim liquid storage of high-level wastes. The policy would also require that the waste be transferred, in solid form, to a Federal repository no later than 10 years following separation of the fission products from the irradiated fuel. These inventory restrictions would be imposed in the interest of minimizing any potential hazard to the public health and safety and of assuring that shipments of a Federal repository are made on a timely basis. The Commission believes that these inventory limitations are reasonable from the standpoint of waste management economics. While a penalty may be incurred in terms of Federal repository space utilization if wastes are placed in a repository at an age under 6 to 8 years, there appears to be little economic incentive to defer placement in the repository of wastes aged more than 10 years. This conclusion takes into account the cost and maintenance of interim solid-storage facilities.

Some concern has been expressed that required solidification of high-level wastes will render unavailable a potentially valuable resource in that these wastes represent a unique source of radionuclides which are useful in various applications, such as compact heat and power sources. However, under the Commission policy, the permissible 5-year inventory of liquid wastes will provide a ready supply of feed material for an isotope recovery facility, and the separated byproducts will not be subject to the inventory limitations. Furthermore, the quantity of isotopes generated in the production of nuclear power will continue to expand rapidly in the foreseeable future; thus, the isotope production in any given year will represent a significant fraction of the total quantity then available.

Interest has been expressed regarding that aspect of the policy which provides that disposal of high-level radioactive fission product waste would not be permitted on any land other than that owned and controlled by the Federal Government. It has been urged that the Commission permit the establishment of repositories for such wastes on State-owned land with operation under AEC licenses. The Commission has considered these suggestions but believes at this time that high-level waste repositories should be under Federal ownership and responsibility. The Commission wishes to emphasize, however, that adoption of this policy will not preclude consideration of State participation in federally owned repositories or in high-level waste management activities at some time in the future.

The health and safety of the public, both of the present and future generations, requires that any permanent repository for high-level radioactive wastes provide complete isolation of the wastes from man's biological environment. The Commission believes that Federal ownership of and responsibility for the proposed Lyons, Kans., repository will provide the most productive and timely means of demonstrating that such repositories can be operated without endangering the health and safety of the public.

Paragraph 2 of the proposed policy published for comment on June 3, 1969: *Provided*, That "High-level liquid radioactive wastes in excess of this authorized inventory must be converted to an AEC-approved solid form." Paragraph 2 has been revised to specify the forms of solidified high-level radioactive wastes considered by the Commission to be acceptable for receipt and disposal at a Federal repository. The specifications have been developed with the view of providing maximum flexibility to licensees in producing solid forms which would satisfy the safety requirements associated with onsite interim storage, transportation, and Federal repository operations.

Data are presently available which will permit independent development of unit costs for all waste management operations involved in complying with the policy other than repository charges.

Following congressional authorization and the completion of the detailed repository design a firm schedule of repository charges will be developed and published by the Commission. As interim guidance the previously cited ORNL report identifies the bases upon which such charges may be developed and provides preliminary estimates. For example, the cost for disposal of a container of waste may be determined as the product of the cost per unit of floor area of the mine and the area that is required to provide for sufficient dissipation of heat from the container. In addition, there would likely be a minimum charge for handling. Of course, all such charges would be subject to adjustment as experience is gained in the operation of the repository.

One of the elements of the policy is that fuel reprocessing plants be designed to facilitate decontamination and removal of all significant radioactive wastes at the time the facility is permanently decommissioned. Viewed from the perspective that each generation is trustee of the environment for succeeding generations, the Commission considers that the public interest requires that a high degree of decontamination capability be included in such facilities and that any residual radioactive contamination after decommissioning be sufficiently low as not to represent a hazard to the public health and safety. Specific requirements for decontamination and decommissioning of fuel reprocessing facilities will be developed in consultation with competent groups. Public comment will be invited before such rules are made effective.

The proposed policy statement, as previously published, also included provisions, designated as paragraphs 6 and 7 of the policy, which related to the disposal of radioactive hulls and other solid wastes resulting from operation of fuel reprocessing plants. Since publication of the proposed policy the Commission has undertaken studies in connection with the ultimate disposal of wastes contaminated with plutonium or other transuranium nuclides. The Commission anticipates that these studies may result in amendments to its regulations identifying certain radioactive materials deemed unsuitable for disposal at licensed, privately operated land burial facilities. Public comment will be invited on such proposed amendments. Any Commission rules on eventual disposal of such wastes will be rules of general applicability to all licensees. Accordingly, paragraphs 6 and 7 have been deleted.

The Commission staff plans to convene a conference of interested industry representatives prior to the expiration of the 60-day comment period for the purpose of assuring a full discussion and exchange of views regarding the policy statement. The date and place of the conference will be announced at an early date.

The text of the statement of policy set out below is the same as that published for comment on June 3, 1969, except for minor editorial changes and (1) the redesignation of the appendix as Appendix F of 10 CFR Part 50; (2) the revision of the definition of "high-level liquid radioactive wastes" in paragraph 1 of the appendix to clarify its application to fuel reprocessing systems other than solvent extraction; (3) the revision of paragraph 2 of the appendix to include a specification of AEC-approved solid form; (4) the inclusion of a statement in paragraph 4 of the appendix to indicate that the decontamination to be required upon decommissioning will be the subject of criteria which the Commission will develop in consultation with competent groups; (5) the deletion of the previously proposed paragraphs 6 and 7 of the appendix, dealing with ultimate disposal of miscellaneous solid wastes generated at fuel reprocessing facilities, in view of current AEC studies which the Commission anticipates may result in proposed amendments to its regulations identifying certain radioactive materials deemed unsuitable for disposal onsite or at licensed, privately owned land burial facilities; and (6) the inclusion in the appendix of a new paragraph 6 providing that with respect to fuel reprocessing plants already licensed, the licenses will be appropriately conditioned to carry out the purposes of the policy stated above.

Pursuant to the Atomic Energy Act of 1954, as amended, and sections 552

and 553 of title 5 of the United States Code, the following amendment to 10 CFR Part 50 is published as a document subject to codification, to be effective 90 days after publication in the FEDERAL REGISTER. The Commission invites all interested persons who desire to submit written comments or suggestions in connection with the amendment to send them to the Secretary, U.S. Atomic Energy Commission, Washington, D.C. 20545, Attention: Chief, Public Proceedings Branch, within 60 days after publication of this notice in the FEDERAL REGISTER. Consideration will be given such submissions with the view to possible amendments. Copies of comments received may be examined at the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

A new Appendix F is added to 10 CFR Part 50 to read as follows:

APPENDIX F

POLICY RELATING TO THE SITING OF FUEL REPROCESSING PLANTS AND RELATED WASTE MANAGEMENT FACILITIES

1. Public health and safety considerations relating to licensed fuel reprocessing plants do not require that such facilities be located on land owned and controlled by the Federal Government. Such plants, including the facilities for the temporary storage of high-level radioactive wastes, may be located on privately owned property.

2. A fuel reprocessing plant's inventory of high-level liquid radioactive wastes will be limited to that produced in the prior 5 years. (For the purpose of this statement of policy, "high-level liquid radioactive wastes" means those aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels.) High-level liquid radioactive wastes shall be converted to a dry solid as required to comply with this inventory limitation, and placed in a sealed container prior to transfer to a Federal repository in a shipping cask meeting the requirements of 10 CFR Part 71. The dry solid shall be chemically, thermally, and radiolytically stable to the extent that the equilibrium pressure in the sealed container will not exceed the safe operating pressure for that container during the period from canning through a minimum of 90 days after receipt (transfer of physical custody) at the Federal repository. All of these high-level radioactive wastes shall be transferred to a Federal repository no later than 10 years following separation of fission products from the irradiated fuel. Upon receipt, the Federal repository will assume permanent custody of these radioactive waste materials although industry will pay the Federal Government a charge which together with interest on unexpended balances will be designed to defray all costs of disposal and perpetual surveillance. AEC will take title to the radioactive waste material upon transfer to a Federal repository. Before retirement of the reprocessing plant from operational status and before termination of licensing pursuant to § 50.82, transfer of all such wastes to a Federal repository shall be completed. Federal repositories, which will be limited in number, will be designated later by the Commission.

3. Disposal of high-level radioactive fission product waste material will not be permitted on any land other than that owned and controlled by the Federal Government.

4. A design objective for fuel reprocessing plants shall be to facilitate decontamination and removal of all significant radioactive wastes at the time the facility is permanently decommissioned. Criteria for the extent of decontamination to be required upon decommissioning and license termination will be developed in consultation with competent groups. Opportunity will be afforded for public comment before such criteria are made effective.

5. Applicants proposing to operate fuel reprocessing plants, in submitting information concerning financial qualifications as required by § 50.33(f), shall include information enabling the Commission to determine whether the applicant is financially qualified, among other things, to provide for the removal and disposal of radioactive wastes, during operation and upon decommissioning of the facility, in accordance with the Commission's regulations, including the requirements set out in this appendix.

6. With respect to fuel reprocessing plants already licensed, the licenses will be appropriately conditioned to carry out the purposes of the policy stated above with respect to high-level radioactive fission product wastes generated after installation of new equipment for interim storage of liquid wastes, or after installation of equipment required for solidification without interim liquid storage. In either case, such equipment shall be installed at the earliest practicable date, taking into account the time required for design, procurement and installation thereof. With respect to such plants, the application of the policy stated in this appendix to existing wastes and to wastes generated prior to the installation of such equipment, will be the subject of a further rule making proceeding.

35 FR 17530

36 FR 5411

May 5, 1971

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 71-1732

THE COMMITTEE FOR NUCLEAR RESPONSIBILITY, INC., ET AL.,
Appellants

v.

GLENN T. SEABORG, ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided October 5, 1971

Mr. David Sive, a member of the bar of the Supreme Court of New York, pro hac vice, by special leave of court, with whom Mr. Samuel H. Weissbard was on the brief, for appellants.

Mr. Edmund B. Clark, Attorney, Department of Justice, with whom Messrs. Shiro Kashiwa, Assistant Attorney General, and Thomas L. McKevitt, Attorney, Department of Justice, were on the brief, for appellees.

Before BAZELON, Chief Judge, and LEVENTHAL and ROBINSON, Circuit Judges.

PER CURIAM: Plaintiffs seek to enjoin an underground nuclear test, code-named Cannikin, to be conducted by the defendant Atomic Energy Commission (A.E.C). The district court granted summary judgment for defendants, and plaintiffs appealed.[1/] The case came on for consideration of plaintiffs' motion for a stay pending appeal and expedited consideration of the appeal. The parties stipulated at the time of oral argument that since briefs on the merits had already been submitted by both parties, the case should be heard on the merits. Accordingly, we consider in this opinion the substantive questions presented. We reverse, and remand the case to the district court for continued proceedings consistent with this opinion.

I.

The A.E.C. is completing plans for an underground test of a nuclear warhead on Amchitka Island, Alaska.[2/] As required by the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 et seq, (1970), the Commission issued an impact statement evaluating the environmental effects of the test. Plaintiffs, seven conservation

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1/ For purposes of this opinion we refer to appellants in this court as "plaintiffs" and appellees as "defendants."

2/ The precise yield of the nuclear test has not been released although it is in the range of five megatons. The test was originally scheduled for October, 1971, but Congress has provided that it may not take place sooner than May, 1972, unless the President gives his direct approval for an earlier date.

groups, seek to enjoin the test primarily on the grounds that the impact statement did not satisfy NEPA's requirements. 3/

Plaintiffs commenced discovery proceedings in an effort to establish the deficiency of the impact statement's treatment of potential dangers of the test. Defendants moved for dismissal of the complaint or in the alternative for summary judgment, and all discovery was stayed pending the outcome of the motion to dismiss. Immediately at the conclusion of the argument on the motion, the district court denied the motion to dismiss but granted summary judgment for defendants. This appeal followed.

II

The district court specifically upheld the sufficiency of the complaint by denying the motion to dismiss. The court did not articulate its reasons for granting summary judgment, but from the record in the case, including the expedition with which the motion for summary judgment was granted, we conclude that the district court accepted the validity of the contention that was most strongly pressed by the Government: that Congress's passage of authorization and appropriations bills for the test represented a conclusive determinati

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3/ Appellants also rested their claim for injunctive relief on three other grounds, asserted violations of:

(1) The Nuclear Test Ban Treaty,
(2) Various statutes designed to protect wildlife, and
(3) The rights under the Fifth and Ninth Amendments of citizens endangered by Cannikin.

of the sufficiency of the impact statement. This contention was, in our view, erroneous, and in order to avoid the continuance of an order that was predicated on an impermissible basis, the judgment of the District Court must be reversed. See The Delaware and Hudson Ry. Co. v. United Transportation Union, No. 71-1183, March 31, 1971.

Congress could, of course, withdraw the question of the statement's compliance from the courts by repealing NEPA as it applied to the Cannikin test. But it is well settled that repeal by implication is disfavored, and the doctrine applies with full vigor when, as here, the subsequent legislation is an appropriations measure,[4/] and when the prior Act is to continue in its general applicability, as construed by the courts, but the claim is made that it is to be subject to a particularized legislative exception.[5/] Congress must be free to provide authorizations and appropriations for projects proposed by the executive even though claims of illegality on grounds of noncompliance with NEPA are pending in the courts. There is, of course, nothing inconsistent with adoption of appropriati and authorizations measures on the pro tanto assumption of validity,

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4/ See, e.g., United States v. Langston, 118 U.S. 389 (1886).

5/ Cf., District of Columbia Civic Assn. v. Volpe, ___U.S. App. D.C. ____, 434 F. 2d 436, 444-47 (1970).

while leaving any claim of invalidity to be determined by the courts.[6] That is the effect of the authorization and appropriations measures relating to the Cannikin test. This conclusion is established by the general principles just discussed. Nothing in the legislative history leads to a different result. On the contrary, there is an affirmative indication that at least some of the Congressmen voting for the authorization and appropriations measures specifically contemplated that the claim of illegality remained for resolution by the courts.[7] The legislative history indicates that while the impact statement was used as reference material by both proponents and opponents of the test, Congress did not purport to make a binding determination on the issue whether the statement was in compliance with NEPA.

Thus, plaintiffs clearly presented a cognizable claim under NEPA,[8] and summary judgment would be appropriate only if they failed to provide any factual underpinning for their claim.[9]

6/ That was precisely the conclusion as to the intent of Congress reached in another NEPA case by the court in Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749, 762-63 (E.D. Ark. 1971).

7/ Thus, Representative Price, in voting for the project, stated concerning the issue of whether the impact statement complied with NEPA: "This matter is before the court. I submit that if there has been any violation of the law, the court will supply the appropriate remedy." 112 Cong. Rec. 6785, July 15, 1971.

8/ See next page.

9/ See next page.

III

Section 102 of NEPA requires, inter alia, that an impact statement assess adverse environmental effects and discuss alternatives to the proposed action.[10] On the ultimate issue whether a project should be undertaken or not, a matter involving the assessment and weighing of various factors, the court's function is limited. However, the court has a responsibility to determine whether the agencies involved have fully and in good faith followed the procedure contemplated by Congress: that is, setting forth the environmental factors involved in order that those entrusted with ultimate determination whether to authorize, abandon or modify the project, shall be clearly advised of the

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8/ In view of our disposition of the case, it is not necessary to rule on whether any of plaintiffs' other three grounds for relief state a claim on which relief can be granted. Our order does not foreclose the district court, on remand, from striking any or all of those grounds for failure to state a claim.

9/ Rule 56, Fed.R.Civ.Pro., permits summary judgment only when no material issue of fact is in dispute and the moving party is by law entitled to judgment. See Sartor v. Arkansas Gas Corp., 321 U.S. 620, 627 (1944).

10/ NEPA, section 102, 42 U.S.C. 4332 (1970):

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

environmental factors which they must take into account. See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, No. 24,839, slip opinion at 11.

The statement has importance in focusing the environmental factors involved even when the officials ultimately responsible are in, or more likely the head of, the office or agency that prepared the report. The ultimate decision must of course take into account matters other than environmental factors, but insofar as staff has prepared the environmental statement for transmission and consideration throughout the entire executive process the officials making the ultimate decision, whether within or outside the agency, must be informed of the full range of responsible opinion on the environmental effects in order to make an informed choice. Moreover, the statement has significance in focusing environmental factors for informed appraisal by the President, who has broad concern even when not directly involved in the decisional process, and in any event by Congress and the public.

10/ (Con't.)

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . .

When, as here, the issue of procedure relates to the sufficiency of the presentation in the statement, the court is not to rule on the relative merits of competing scientific opinion. Its function is only to assure that the statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting from the statement, and hence from the focus that the statement was intended to provide for the deciding officials, any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects.[11/] Only responsible opposing views need be included and hence there is room for discretion on the part of the officials preparing the statement; but there is no room for an assumption that their determination is conclusive. The agency need not set forth at full length views with which it disagrees, all that is required is a meaningful reference that identifies the problem at hand for the responsible official. The agency, of course, is not foreclosed from noting in the statement that it accepts certain contentions or rejects others.[12/]

11/ Compare Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749,759 (E.D.Ark.1971).

12/ Compare Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749, 759 (E.D.Ark.1971).

By means of discovery and the introduction of the affidavit of a scientific expert, plaintiffs attempted to prove that the requirement of the law was not met "fully and in good faith" by the A.E.C. The district court's grant of summary judgment erroneously foreclosed this line of inquiry to plaintiffs.

Summary judgment is only appropriate when there is no bona fide material issue, and Rule 56 clearly contemplates that the parties shall have opportunity for deposition in order to establish the existence of a material issue.[13/] Here, plaintiffs sought to establish that there was responsible scientific opinion as to possible adverse environmental consequences, a fact that would be material in support of their legal claim that omission of all reference to such scientific opinion was contrary to the process prescribed by NEPA.[14/]

Plaintiffs also alleged the existence of reports by federal agencies recommending against Cannikin specifically because of potential harm to the environment. NEPA clearly indicates that the agency responsible for a project should obtain and release such

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13/ Cf., Rule 56(f), Fed.R.Civ.Pro., Berne Street Enterprises, Inc. v. American Export Isbrandtsen Co., Inc., 289 F.Supp. 195 (S.D.N.Y. 1968), 6 Moores' Federal Practice, § 56.24.

14/ We do not here decide that the statement is inadequate, but only that the district court is not to foreclose an opportunity to plaintiffs to make their submission on this point.

adverse reports.[15] If these reports exist, and they are not subject to some statutory exemption, plaintiffs must prevail on this contention as well.[16] Plaintiffs attempted, through deposition of the A.E.C. and through attempted deposition of the agencies whom they believed to have such reports, to uncover facts supporting their claim. The grant of summary judgment prematurely terminated the discovery process and foreclosed plaintiffs' opportunity to substantiate their allegations.

Since unresolved questions of fact existed as to both of plaintiffs' arguments under NEPA, summary judgment was plainly inappropriate. On remand, plaintiffs' discovery--subject of course to the possible interposition of valid claims of privilege--should be allowed to continue.[17]

Reversed and remanded.

15/ 42 U.S.C. 4332 (1970).

16/ We do not consider whether the court may decline to order the release of agency comments on the ground that they are not so related to the impact statement as to require their inclusion therein, or on the ground that they are exempt from public disclosure by virtue of exemptions set forth in the Freedom of Information Act, 5 U.S.C. 552 (1970), which should be transported into NEPA. No such grounds were presented to us at this time, and accordingly we express no opinion thereon.

17/ Since defendants stated that the test would not take place without ample notice to the plaintiffs, we see no need to consider whether or not to issue a stay pendente lite. If the need arises, the question of a stay may, of course, be addressed to the district court.